RECENT AMERICAN DECISIONS.

Supreme Court of Pennsylvania.

WESTMORELAND AND CAMBRIA NATURAL GAS CO.

v.

DE WITT ET AL.

Natural gas belongs to the owner of the land, and is a part of it, and, so long as it is on or in it, is subject to his control; but when it escapes, and goes into other land, or comes under another's control, the title of the former owner is gone.

If an adjoining or distant owner drills a well on his own land, and taps his neighbor's vein of gas, so that it comes into his well and under his control, such gas belongs to the owner of the well.

The owner of land, leasing it to another for the purpose of drilling gas wells thereon, and reserving the right to till the soil, after the lessee has drilled a well and has gas ready to flow into pipes by turning a valve, cannot claim that the lessee is not in possession, and that he must resort to a court of law to establish his title before a court of equity will interfere.

The grant by lease of a certain tract of land for the purpose of sinking and operating gas wells, "no wells to be drilled within 300 yards of the brick building" on the tract, is a release of the right of the grantor to lease the land within such 300 yards, for the purpose of sinking and maintaining a gas well.

If both parties disregard the strict terms of a lease, respecting payment at the lessor's request, and no attention is paid to a delay in part of a payment, and no demand is made therefor by the lessor, such acts constitute a waiver of the right to demand a forfeiture for non-payment.

A payee, by saying that it will be useless to exhibit the money to him, when the money is present, waives his right thereafter to insist that no proper tender in that respect was made.

Appeal from Court of Common Pleas of Westmoreland County.

Moorhead & Head, for appellant.

D. S. Atkinson, J. M. Peoples, Vin. E. Williams, and *W. A. Griffith*, for appellees.

MITCHELL, J., November 11, 1889. Complainants filed a bill, setting forth a lease of land from Brown, one of the respondents, for oil and gas purposes; the expenditure of large sums of money under the lease; a subsequent lease of the same land by Brown to the other respondents, who took with knowledge of complainants' rights; and the entry by them with the intent to drill a well upon the said land, and take gas, etc. The bill concluded with an averment that such a well could be drilled

and put in operation in about forty days, long before an adjudication could be had upon the rights of the parties, and that thereby enormous waste would be committed upon the premises of complainants, and irreparable injury to their interests; wherefore they prayed an injunction, etc. The answer of respondents substantially admitted all of the facts set up in the bill, except that the well which they were about to drill was on premises leased to complainants, and that irreparable injury to complainants would result therefrom; and further setting up that the lease to complainants had been forfeited for non-payment of certain moneys due thereunder.

Two issues, therefore, were raised by the pleadings: *First*, whether the well contemplated by the respondents was upon the leased land; and, *secondly*, whether there had been a forfeiture of the lease. The actual fact not being disputed, both these issues really turned on the construction of the lease. Under these issues the parties went on for some months, and completed their evidence. When, however, the case came to be argued before the master, the respondents took the ground that the complainants, being out of possession, and their title being disputed, had no standing in equity, but must first establish their rights at law. The learned master adopted this view, found as a fact that complainants were out of possession, and reported, as a conclusion of law therefrom, that the bill must be dismissed. The Court below adopted this report with only a formal opinion, expressing unwillingness to say the master had erred.

The master finds formally that, "during several months prior to the filing of the bill, Brown, claiming a forfeiture of said lease, had taken full and absolute possession of the premises and rights mentioned and granted in the lease." An examination, however, of the evidence fails to disclose a single fact on which such a finding can be sustained. It rests entirely on a misconception of the subject-matter of the possession in question, and the nature of the possession itself of which the subject-matter admitted. The subject of possession was not the land, certainly not the surface. All of that, except the portions actually necessary for operating purposes, was expressly reserved by the lease to Brown, the lessor. Except of such por-

tions, the complainants had no possession that was not concurrent with that of the lessor, if, indeed, it could be called possession of the land at all. Complainants' right in the surface of the land under the lease was rather in the nature of an easement of entry and examination, with a right of possession arising where a particular place of operation should be selected, and the easement of ingress, egress, storage, transportation, etc., during the continuance of the operation. The real subject of possession to which complainant was entitled under the lease, was the gas or oil contained in, or obtainable through, the land.

The learned master says, gas is a mineral, and while *in situ*, is part of the land, and therefore possession of the land is possession of the gas. But this deduction must be made with some qualifications. Gas, it is true, is a mineral; but it is a mineral with peculiar attributes, which require the application of precedents arising out of ordinary mineral rights, with much more careful consideration of the principles involved than of the mere decisions. Water also is a mineral; but the decisions in ordinary cases of mining rights, etc., have never been held as unqualified precedents in regard to flowing, or even to percolating, waters.

Water and oil, and still more strongly gas, may be classed by themselves, if the analogy be not too fanciful, as minerals *feræ naturæ*. In common with animals, and unlike other minerals, they have the power and the tendency to escape without the volition of the owner. Their "fugitive and wandering existence within the limits of a particular tract was uncertain," as said by Chief Justice AGNEW in *Brown* v. *Vandegrift* (1875), 80 Pa. 147, 148. They belong to the owner of the land, and are part of it, so long as they are on or in it, and are subject to his control; but when they escape, and go into other land, or come under another's control, the title of the former owner is gone. Possession of the land, therefore, is not necessarily possession of the gas. If an adjoining, or even a distant, owner, drills his own land, and taps your gas, so that it comes into his well and under his control, it is no longer yours, but his. And equally so as between lessor and lessee in the present case, the one who controls the gas—has it in his grasp, so to

speak—is the one who has possession in the legal as well as in the ordinary sense of the word.

Tested by these principles, there is not the slightest doubt that the possession of the gas, as well as the right to it under this lease, was in the complainants when the bill was filed. They had put down a well, which had tapped the gas-bearing *strata*, and it was the only one on the land. They had it in their control, for they had only to turn a valve, to have it flow into their pipe, ready for use. The fact that they did not keep it flowing, but held it generally in reserve, did not affect their possession any more than a mill-owner affects the continuance of his water-right when he shuts his sluice-gates. On the other hand, Brown had no possession of the gas at all. His possession of the soil for purposes of tillage, etc., gave him no actual possession of the gas; and he had no legal possession, for his lease had conveyed that to another. How, then, had he taken "full and absolute possession of the premises and rights," as found by the master? Apparently, he had asserted to the complainants his claim that the lease was forfeited. In addition, on one occasion, when the agent of complainants was at their well for a specific purpose, Brown had ordered him off the land; but there is no evidence that he went until he had finished his business there. Shortly before this the complainants had sent men on the land to begin the erection of a derrick for a second well, and Brown had ordered them off. This, which is the strongest item in the proof, is really no evidence at all of dispossession of complainants. They still remain in possession of their well, which gave them the sole control of the gas, so far as its utilization was concerned, and the sole possession of which it was capable, apart from the land, from which it had been legally severed by the lease. The utmost that can be said of such an occurrence is that it was a violent and temporary interference with that portion of complainants' rights which authorized them to put down a second well. This was no more a dispossession of complainants from their occupation of the gas than blocking up one of a farmer's roads to his home would be an ouster from his farm. We are therefore of opinion that the master was wrong in finding as a fact

that complainants were out of possession, and should be remitted to an ejectment to establish their title at law.

As to the other objections to the jurisdiction of equity, they require but a brief notice. The bill is a bill to stay waste, and that the damage threatened, even if not irreparable, is entirely incapable of measurement at law, cannot be seriously questioned. Such cases were among the earliest, and have always been among the most incontestable, within the chancellor's jurisdiction. It is superfluous to cite authorities for so familiar a principle, but I may refer to *Allison's Appeal* (1875), 77 Pa. 221, as a recent case in this Court, where the invasion restrained, was of complainants' right to oil, a fluid far more capable of accurate measurement than gas.

The learned master having come to the conclusion that the bill should be dismissed for want of equity, forbore to consider and pass upon the substantial issues raised by the pleadings. But as the evidence was fully taken by both parties before him, and he has found all the facts necessary to a final determination of the whole controversy, we will proceed to consider it. The actual facts, as already said, are not disputed, and both issues substantially depend upon the construction of the lease.

We have therefore to consider—*First*, whether the well threatened to be put down by respondents was upon the leased land. Of this there cannot be the slightest doubt. The lease is of "all that certain tract of land," etc. This means the whole tract. The grant is limited as to the intention "for the sole and only purpose of drilling and operating wells," etc., but is not limited as to territory. Following the description of the tract is the clause on which respondents rely—

"No wells to be drilled within three hundred yards of the brick building belonging to J. H. Brown."

The well which respondents propose to bore is within this prohibited distance; and the respondents claim that Brown, and they as his lessees, have the right to drill wells within that part of the territory. But the clause in question is neither a reservation nor an exception as to the land, but a limitation as to the privilege granted. It does not, in any way, diminish the area of the land leased,—that is still the whole tract; but it restricts the operations of the lessees in

putting down wells to the portions outside of the prohibited distance. For right of way and other purposes of the lease, excepting the location of wells, the space inside the stipulated line is as much leased to the lessee as any other part of the tract. The terms of the grant would imply the reservation to the lessor of the possession of the soil for purposes other than those granted to the lessee, and the parties have expressed what otherwise would have been implied by the provision that the lessor is to fully use and enjoy the said premises for the purpose of tillage, except such part as shall be necessary for said operating purposes.

From the nature of gas and gas operations, already discussed, the grant of well-rights is necessarily exclusive. It was so held even as to oil-wells, in *Funk* v. *Haldeman* (1867), 53 Pa. 229, 247, 248, although, in that case, the plaintiff had a mere license to enter, etc., and not, as complainants here, a lease of the land; and it is exclusive, in the present case, over the whole tract. As already said, the clause relative to the 300-yards distance was a restriction on the privilege granted, not a reservation of any land, or any boring rights, to the lessor; and a well upon the prohibited portion was just as damaging to the lessees as upon any other portion of the tract. The drilling of the well threatened by respondents, is therefore in violation of the lease, and should be enjoined if the lease is still in force.

Secondly, has there been a forfeiture of the lease? It is claimed by respondents on account of the failure of the lessee to make certain stipulated payments. The lease is dated December 7, 1885, and by its terms the lessee was to pay $500 a year for each gas-well, payable quarterly, in advance, from the completion of each and every well; and in case one well should not be completed within three months from the date of the lease, then to pay

"For such delay the sum of one hundred and twenty-five dollars every three months from the date of this agreement; * * * and [lessor] agrees to accept such sum as full consideration and payment for such delay until one well shall be completed; and a failure to complete one well, or to make any of such payments within such time and at such place as above mentioned, renders this lease null and void. * * * It is further agreed that if any of the within payments remain unpaid thirty days, then this lease to be null and void."

These are all the provisions which bear upon the present question, and their effect is entirely clear. One well is to be completed in three months, and the rent is to begin from its completion. This is the primary intent and expectation of the parties. But, if not so completed, then the lessee is to pay a like amount from the date of the agreement, until one well is completed, and thereafter, of course, the payments are not to be for delay at the end of each three months, but as rent, quarterly, in advance. A failure to pay any of the sums due for a period of 30 days, is to render the lease null and void. The first provision for forfeiture cannot be read literally and separately, as it is in manifest conflict with the other covenants. Thus it invokes a forfeiture for failure to complete one well in three months, but in so doing it is repugnant to the agreement to accept the stipulated "full consideration and the payment for delay." Again, it imposes the forfeiture for failure to make any of the payments at the time and place mentioned, and in so doing is in conflict with the subsequent agreement that the forfeiture shall only be for a default of 30 days. Reading all these clauses together, therefore, as we are bound to do, the last-mentioned clause, calling for a forfeiture upon a default of 30 days in the payments, is the only one that is effective for the purpose of forfeiture.

Before passing to the acts of the parties, it may be well to notice very briefly the construction of the agreement set up by the respondents in their answer, though not pressed in their argument. It is that the default in payment *ipso facto* created a forfeiture; or, in other words, that the forfeiture was absolute and self-operating, without regard to the acts or wishes of the parties. Such a construction is utterly untenable. It is contrary, not only to the settled rules of law, but to the manifest intentions of the parties. This question is definitively settled in *Wills* v. *Gas Co.* (at the present term, Nov. 11, 1889), the opinion in which is filed herewith by our Brother CLARK.

Coming now to the facts as reported by the master and practically undisputed, we find that the parties from the outset, entirely disregarded the strict times and terms of payment, as set out in the lease. On the day following the date of the lease, the lessees paid $250 on account. It is admitted

that such payment was made, and that it was a voluntary advance, as nothing was or would be due under the lease for three months, and then only half that amount. In June, another payment of $250 was made, and this, again, was more than was due under any possible construction of the lease. A quarterly payment for delay had become due on March 7, 1886. The well being completed April 23, there would, under the construction contended for by the lessor, then be due compensation for the 46 days of additional delay, amounting to $65, and a quarter's rent in advance, which latter was covered by the advance of $250 in the previous December. The June payment, therefore, fully covered this $65, another quarter's rent from July 23 to October 23, and an advance of $60—nearly one-half the quarter's rent that would become due in October, four months later. This calculation, as already said, is upon the most favorable possible construction for the lessor. But in fact there is not the slightest doubt that both parties entirely disregarded the strict terms of the lease as to times of payment, and treated the payments of December and June as semi-annual advances of the stipulated sum, no matter whether called "compensation for delay" or "rent," as the amounts in either case were exactly the same. Neither party paid the least attention to the possible fag end of a quarter's delay, the lessor never demanded it, no reference to it was made at the time of the June payment, and it made its appearance in the transactions months later as an after-thought.

Forfeitures, if no longer odious—and I for one am too strongly in favor of the enforcement of contracts as parties make them, to apply harsh names to strict constructions—are yet not favored, either at law or equity, and among the least favored have always been those founded on mere delay in the payment of money. In this case, there is not the slightest pretense of any other ground for forfeiture, than the failure to pay a small amount of money in advance. As already shown, not a single payment under this lease was made strictly according to its terms; the departure was begun by the lessor's request, and was always in his favor. To allow him now to turn around without notice and enforce a forfeiture for a fail-

ure of the insignificant proportions shown, would be sanctioning a fraud such as no court has ever permitted.

There is another ground equally fatal. Forfeitures are always strictly construed; and, looking at the facts, none has been incurred here, even on respondent's own view of the amounts due. As already seen, the June payment, deducting the $65 for delay, still paid the quarter's rent beginning July 23, and nearly half of the quarter beginning October 23, 1886. Under the lease, a forfeiture would not be incurred unless a payment should remain unpaid for 30 days. On October 23, a quarter's rent was due in advance, but only half of it was unpaid, for half of it had been paid in advance in the preceding June. The lease does not provide a forfeiture for failure to pay a balance, but only "if any of the within payments remain unpaid," which means a whole payment, not a balance on a running account. No forfeiture, therefore, was incurred, or could be, until the next payment should become due and be unpaid for 30 days. The next quarter day was January 23, 1887; and a week before that date, on January 15, the lessees tendered the rent to Brown, and it was refused. The master's findings of fact, under the view he took, do not extend to the occurrences of January 15, 1887; but the testimony was taken by both parties, and leaves no doubt that there was a valid tender. Both Rhodes and Webb say the money was held in one hand, where Brown could see it, while the voucher was read to him; and Brown himself says Rhodes told him he had come to pay, though he did not actually see the money, and that he told Rhodes it would "be altogether unnecessary" to show the money. This, under the circumstances, dispensed with further formalities. Whether, therefore, we regard the strict conditions of the lease as waived by the conduct of the parties, or the failure in payment as only a partial and incomplete default, it is equally clear that there was no forfeiture, and the respondents have failed to show any defense to the bill.

The decree is reversed, the bill reinstated, and the injunction reinstated, made perpetual, and directed to be so issued; costs to be paid by the appellees; and the record is remitted to the Court below to execute this order.

NOTE.—The analogy between natural gas and petroleum is so striking that we propose to cite cases respecting both of them.

An "Internal Improvement"—Right of Eminent Domain. An Act of West Virginia (Act of February 27, 1867; Laws of 1867, Ch. 95, p. 110; amended February 26, 1868; Laws of 1868, Ch. 67, p. 63) created a corporation "to lay out and construct or cause to be laid out and constructed and maintained a line or lines of tubing, for the purpose of transporting petroleum or other oils through pipes of iron or other materials," in certain counties, "to any railroad or other roads, or to any navigable stream or streams in or adjoining" the counties named, "and to transport from the termini of said pipe or pipes, petroleum or other oils in tank cars, boats or other receptacles belonging to said company." The Act established the maximum charges the company could make for transportation. This was a special Act; and the Constitution (of 1863) provided that "The Legislature shall pass general laws whereby any number of persons, associating for mining, manufacturing, insuring, or other purpose, useful to the public, excepting banks of circulation, and the construction of works of internal improvement, may become a corporation," etc.

The Court held that this company was engaged in a work of "internal improvement," and its charter authorized by the Constitution: *West Virginia Transportation Co.* v. *Volcanic Oil and Coal Co.* (1872), 5 W. Va. 382.

The transportation and supply of natural gas for public consumption is recognized as a public use in Pennsylvania; and the right of eminent domain granted to such corporations by the Act of 1885, is within the constitutional power of the Legislature to grant. "It is a curious objection to set up against the Act of 1885, in view of the present consumption of natural gas, that its use is not a public one, and that, therefore, those corporations which are engaged in its transportation, may not be vested with the right of eminent domain. As well might this objection be urged against the vesting of this power in those companies which have been incorporated for the purpose of supplying our towns and villages with water, in which the public interest is found not in the transportation, but in the use of that fluid, after it has, by these agencies, been transported. Nor would it seem to us as of the slightest materiality that the water thus produced, had been drawn from a simple spring, well or basin. Just so with natural gas; it has become a public necessity, but as it cannot be used except it be piped to the manufactories and residences of the people, it follows that as the piping of it is necessary to its use, the means so used for its transportation must be of prime importance to the public, and directly affect its welfare:" *Per Curiam, Johnston* v. *People's Natural Gas Co.* (Sup. Ct. Pa., Nov. 15, 1886). To the same effect, *Bloomfield & Rochester Natural Gas-Light Co.* v. *Richardson* (1872), 63 Barb. (N. Y.) 437; *Appeal of Pittsburgh* (1886), 115 Pa. 4; *Carothers* v. *Philadelphia Co.* (1888), 118 Id. 468.

[The Pennsylvania Act of 1885 (P. L. pp. 33–35) provides—"SECTION 10. The transportation and supply of natural gas for public consumption, is hereby declared to be a public use, and it shall be the duty of corporations, organized or provided for under this Act, to furnish to consumers along their lines and within their respective districts, natural gas for heat, or light, or other purposes, as the corporation may determine. Any and all corporations that is, or are now, or shall hereafter be engaged in such

business, shall have the right of eminent domain for the laying of pipe lines for the transportation and distribution of natural gas; the right, however, shall not be exercised as to any burying ground or dwelling, passenger railroad station-house, or any shop or manufactory in which steam or fire is necessarily used for manufacturing or repairing purposes, but shall include the right to appropriate land upon or under which to lay said lines and locate pipes upon or over, under and across, any lands, rivers, streams, bridges, roads, streets, lanes, alleys, or other public highways, or other pipe lines, or to cross railroads or canals: *Provided*, In case the pipe lines cross any railroad, operated by steam, or canal, the same shall be located under such railroad or canal, and in such manner as the railroad or canal company may reasonably direct. *And provided further*, That any company laying a pipe line under the provisions hereof, shall be liable for all damages occasioned by reason of the negligence of such gas company: *And provided further*, That no company authorized by this Act, shall have the right to occupy longitudinally, the right of way, road bed, or bridge of any railroad company: *And provided*, If any pipe line laid under the provisions of this Act, or laid upon or over lands cleared and used for agricultural purposes, the same shall be buried at least twenty-four inches below the surface, and if any line of pipe shall be laid over or through any waste or woodland, which shall be changed to farming land, then it shall be the duty of the corporation to immediately bury the said pipe to the depth of at least twenty-four inches as aforesaid.

Prior to any appropriation, the corporation shall attempt to agree with the owner as to the damage properly payable for an easement in his or her property, if such owner can be found and is *sui juris*, failing to agree, the corporation shall tender to the property owner a bond with sufficient sureties to secure him or her in the payment of damages; if the owner refuse to accept said bond or cannot be found or is not *sui juris*, the same shall then be presented to the Court of Common Pleas of the proper county, after reasonable notice to the property owner, by advertisement or otherwise to be approved by it. Upon the approval of the bond, and its being filed, the right of the corporation to enter upon the enjoyment of its easement shall be complete. Upon petition of either the property owner or the corporation, thereafter, the Court of Common Pleas shall appoint five disinterested freeholders of the county to serve as viewers to assess the damages proper to be paid to the property owner, for the easement appropriated by the company, and shall fix a time for their meeting of which notice shall be given to both parties.

Either party may appeal from the report of the viewers, within twenty days after the filing thereof, to the Court of Common Pleas, and have a jury trial as in ordinary cases, and writ of error to the Supreme Court.

SECTION 11. The right to enter upon any public lane, street, alley, or highway, for the purpose of laying down pipes, altering, inspecting, and repairing the same, shall be exercised in such way as to do as little damage as possible to such highway, and to impair as little as possible the free use thereof, subject to such regulations as the councils of any city may by ordinance adopt.

SECTION 12. In all cases where any dispute shall arise between such corporations and the authorities of any borough, city, township or county, through, over or upon whose highways, or between it and any land owner or corporation, through,over or upon whose property or easement, pipes are to be

laid, as to the manner of laying the pipes, and the character thereof, with respect to safety and public convenience, it shall be the duty of the Court of Common Pleas of the proper county, upon the petition of either party to the dispute, upon a hearing to be had, to define by its decree, what precautions, if any, shall be taken in the laying of pipes, and, by injunction, to restrain their being laid in any other way than as decreed. It shall be the duty of the court to have the hearing and make its decree with all convenient speed and promptness. Either party shall have a right to appeal therefrom, as in cases of equity, to the Supreme Court, but the appeal shall not be a *supersedeas* of the decree, and proceedings shall be had in like manner upon like petition, when and as often as any dispute arises as to pipes already laid, to define the duty of such corporation as to their re-laying, repair, amendment, or improvement.

SECTION 13. Companies incorporated under this Act, and not referred to or included in the next succeeding section hereof, shall not enter upon or lay down their pipes or conduits on any street or highway of any borough or city of this Commonwealth, without the assent of the councils of such borough or city by ordinance, duly passed and approved."

[Section fourteen provides for the acceptance of the provisions of this Act by corporations theretofore incorporated, under certain restrictions contained in this and the two following sections.

[Sections one to eleven provide for incorporation of natural gas companies, and section seventeen for the consolidation of existing corporations. Sections eighteen to the end relate to injuries to works, and to plugging wells.

A statute of Pennsylvania (Act of April 24, 1874, P. L. 70 § 4) provided "that every railroad company, coal company, steamboat company, slackwater navigation company, *transportation company*, street passenger company," etc., operating "any railroad, canal, slackwater navigation, or street passenger railway, or device for the transportation of freight or passengers," should be subject to pay into the State Treasury a certain tax. Under this law, a petroleum company, conveying oil from wells to tanks and reservoirs by means of pipes, were liable to the tax, as a "transportation company," transporting freight: *Columbia Conduit Co.* v. *Commonwealth* (1879), 90 Pa. 307; *Appeal of the City of Pittsburgh* (1888), 123 Id. 374.

An Act, passed long before natural gas was in use (Act of April 7, 1870, P. L. 1026, § 2), authorized the formation of a company to buy, maintain, or manage in its own name, "any work or works, public or private, which may tend or be designed to improve, indorse, facilitate, or develop, trade, travel, or the transportation and conveyance of freight, live stock, passengers, or any other traffic, by land or water, from or to any part of the United States." It was held that this authorized the formation of a company to transport natural gas; and the powers of eminent domain given by the statute (§ 4), empowered the company to condemn a right of way for a pipe line: *Carothers* v. *Philadelphia Co.* (1888), 118 Pa. 468.

Incorporation under General Laws.

The General Corporation Act of Pennsylvania (April 29, 1874, P. L. 73), provides for incorporation for (§2, clause 2, page 74), "XI. The manufacture and supply of gas, or the supply of light or heat to the public by any other means." Their powers were defined to be (§34, p. 93),—"*Clause* 1. Where any such company shall be incorporated as a gas company, or company for the supply of heat or light to the public, it shall have authority to supply with gas

light, the borough, town, city or district where it may be located, and such persons, partnerships and corporations residing therein, or adjacent thereto, as may desire the same, at such price as may be agreed upon, and also to make, erect and maintain therein the necessary buildings, machinery and apparatus for manufacturing gas, heat or light from coal, or other material, and distributing the same, with the right to enter upon any public street, lane, alley, or highway, for the purpose of laying down pipes, altering, inspecting, and repairing the same, doing as little damage to said streets, lanes, alleys and highways, and impairing the free use thereof as little as possible, and subject to such regulations as the councils of said borough, town, city or district may adopt in regard to grades, or for the protection and convenience of public travel over the same."

In denying the right of a natural gas company to become incorporated under this statute, GREEN, J., *Emerson* v. *Comm.* (1884), 108 Pa. 111, 125, 126, said—"It seems to us plain that the words of this section contemplate, and authorize, the creation of corporations for the manufacture and supply of gas, and the supply of light or heat, by any other means. Of course the only kind of gas companies that are authorized, are those which manufacture gas, and this necessarily excludes corporations for supplying natural gas, that being a product of nature, and not the result of any manufacturing process. The other companies authorized, are those for supplying light or heat, produced by any other means. * * * The furnishing of natural gas is not the furnishing of heat. Natural gas is not heat. It is a fuel, a substance which may be converted into heat by combustion with atmospheric air. When gas is delivered to the consumer, it is still gas only. It is not heat." In denying a re-argument, the said Justice said—"Counsel are in error, in supposing that we decided that the Act of 1874 did not authorize the incorporation of companies for furnishing heat from natural gas. We carefully distinguished between charters for furnishing heat and those for furnishing natural gas itself; and we expressly declined to declare the respondent's charter void because it *was* a charter to furnish heat:" p. 127.

Use of Public Street, or Country Highway.

(See page 115, *infra.*)

The laying of natural gas pipes in a public highway is an additional burden upon the easement; and cannot be done without the payment of damages for the privilege.

A court of equity will restrain the laying of such pipe until the damages are assessed and paid: *Sterling's Appeal* (1885), 111 Pa. 35; *In re Bloomfield and Rochester Natural Gas Light Co.* (1875), 62 N. Y. 386; s. c. below, *Bloomfield and Rochester Natural Gas Light Co.* v. *Richardson* (1872), 63 Barb. (N. Y.) 437. This rule has been applied by the Common Pleas of Mahoning County, Ohio, even to a street in a city: *Webb* v. *Ohio Gas Fuel Co.* (1886) 16 Weekly L. Bull. 121, following *The Lawrence R. R. Co.* v. *Williams* (1878), 85 Ohio St. 168.

Use of a Railroad's Right of Way.

When a railroad company does not take the land condemned, in fee, the original owner may lawfully enter upon the road-bed and lay an oil or gas pipe line under the railroad track: *Hasson* v. *Oil Creek and Allegheny River R. R. Co.* (1871), 8 Phila. 556.

Ejectment.

"The plaintiff insists that the agreement amounts to a sale of the oil [in the ground] itself, and that the oil, being a part of the land, in a corporeal hereditament, to recover possession of

which ejectment will lie. But if it be conceded that by the contract, there was a grant of the oil, it by no means follows from that alone that ejectment is maintainable. Oil is a fluid like water; it is not the subject of property, except while in actual occupancy. A grant of water has long been considered not to be a grant of anything for which an ejectment will lie. It is not a grant of the soil upon which the water rests:" *Dark* v. *Johnson* (1867), 55 Pa. 164.

But where the lease of land was for "the sole and exclusive right to bore or dig for oil * * and gather and collect the same * * for the term of twenty years," and for "the sole and and exclusive right to mine for coal, iron-ore and all other minerals, which may be obtained on said lands," the lease vested in the lessee a corporeal interest for which ejectment would lie: *Barker* v. *Dale* (1870), 3 Pitts. (Pa.) 190 [and a receiver will not be appointed, unless under urgent and peculiar circumstances]: *Chicago, etc., Oil and Mining Co.* v. *U. S. Petroleum Co.* (1868), 57 Pa. 83.

A. granted to B. the exclusive right of boring for oil on a certain farm, reserving the right to farm the surface; if the boring proved profitable, the contract was to be construed as a perpetual lease; if otherwise, possession was to revert to A. On a part of the farm the boring proved profitable. A. brought suit, alleging that the boring had not been profitable on another part of the farm, and asked judgment for possession of that part. The Court held that ejectment would not lie to test A's right to bore for oil; but it would lie, under the agreement, if B. had occupied the land for other purposes, or to an extent greater than allowed by the contract, or if the license was revocable, or had been forfeited by B. The license, when made effectual by a successful result according to the terms of the agreement, is perpetual and irrevocable: *Rynd* v. *Rynd Farm Oil Co.* (1870), 63 Pa. 397.

An agreement was to lease "the exclusive right and privilege of boring for salt, oil or minerals upon his farm * * upon which the first party now resides, * * with the right of access to and from such places as may be selected by the party of the second part; * * * said boring to be done so as to do the least possible injury to the farm," for a consideration of $150, and one third of the product. Holes were to be sunk to satisfy the parties as to practicability and profit for oil. This created an incorporeal hereditament, and the only possession of the grantee was such as was necessary for the enjoyment of the right; the remedy for disturbance of the right was case, and not ejectment: *Union Petroleum Co.* v. *Oliver Petroleum Co.* (1872), 72 Pa. 173.

[In *Phillips* v. *Coast*, decided by the Supreme Court of Pa., January 6, 1890 (25 W. N. C. 275), defendants had *bona fide*, and, by mistake, sunk a well on plaintiffs' land, for the purpose of boring for, and extracting oil. Plaintiffs brought an action of ejectment, and a receiver was appointed to keep an account of the product of the well during the continuance of the suit. The Court held that the defendants were entitled to compensation, for their expenses in sinking such well, out of the proceeds of the oil produced. GREEN, J., "This is a kind of improvement of an unusual character, and one which particularly commended itself to the favorable opinion of the Courts. It was an oil well with all the machinery and appliances necessary to its operation. Now without this well and machinery the oil could not possibly be obtained. After it was completed, its operations were all for the benefit of the plaintiffs. * * * Obtaining oil from the bowels of

the earth is a very different thing from obtaining crops from the surface of the ground. The oil only exists at a distance of hundreds of feet below the surface. If it is not developed by means of wells, it is the same as if it had no existence at all. It is in a state of nature, of no use or value whatever to the owner of the land. * * * Therefore it is no hardship whatever to them, to repay to the defendants the bare cost of the well and appliances which belong to the plaintiffs now, and the whole benefits of which accrue to them alone. * * * The proposition that oil is part of the land, and cannot be regarded as mesne profits, and hence the right to compensation for valuable improvements, has no application. The oil has been taken. It is not a question of staying waste, but of allowance for the cost of valuable improvements actually necessary and made in good faith. For such improvements, compensation is allowed, whether that which is taken be mineral oil or other substance of the land or not:" *Kille* v. *Ege* (1876), 82 Pa. 102 and *Ege* v. *Kille* (1877), 84 Pa. 333, followed.

Liability for Negligence.

A natural gas company is not liable for injuries resulting from the negligence of an independent contractor, occurring before acceptance of his work; unless work is accepted which the company knew, or ought to have known, had been performed in an unsafe and dangerous manner: *Chartiers Valley Gas Co.* v. *Waters* (1888), 123 Pa. 220; *Same* v. *Lynch* (1888), 118 Id. 362. The tenth section of the Act of 1885 (*supra*, p. 102) was held, in these cases, to impose no duty, "no express or definite obligation" as regards what work should be done, or how: per HAND, J., 123 Pa. 230.

One taking gas from a natural gas company assumes only the usual and ordinary risks of such use, but not extraordinary risks caused by the negligence of the company: *Oil City Fuel Supply Co.* v. *Boundy* (1888), 122 Pa. 449.

A gas company may not lay its pipe on the bottom of a navigable river, without incurring the risk of liability for accidents caused thereby; as where a boat ran on to such a pipe by accident, broke it, and the escaping gas caught fire from the boat's furnace and burned it up: *Ormslaer* v. *Philadelphia Co.* (1887), U. S. Dist. Ct., W. Dist. Pa., 31 Fed. Repr. 354.

Regulation by a Municipality.

[Under Sections Eleven and Thirteen of the Act of 1885 (*supra*, pp. 103, 104), City "Councils are authorized to give, or withhold their assent, without more. They have no right to couple their assent with any condition, or restriction, not imposed by the Act, unless the company agrees to accept the same, and be bound thereby; and even then the conditions, or restrictions, so accepted by the company, must harmonize and in nowise conflict with the provisions of the Act. * * * In view of the limited authority delegated to Councils, it is a grave mistake to assume, as they appear to have done in this case, that they have power to legislate on any and everything connected directly, or indirectly, with the general subject:" STERRETT, J., *Appeal of City of Pittsburgh* (1886), 115 Pa. 4.

[The Councils of the City of Pittsburgh, under this authority, passed two ordinances, of August 10, 1885, and December 29, 1885, and the following sections were declared void, in the case cited above:

1. That the City Engineer should control the work of laying pipes, to the exclusion of the company.

2. That the pipes should be tested; because indefinite as to how, when, or by whom the test was to be made.

3. That a formal acceptance be made by the company of the ordinance, especially as to those provisions illegal and void.

4. That the company should submit to the city "plans, methods, specifications, and estimates" for the acceptance or refusal of the Commissioner of Highways, with appeal to the Councils, whose action was to be final, when the statute provided for an appeal to the court. Also a provision requiring such plans, on any extension of the pipes.

5. That a showing be made, under oath, of the names of the stockholders, the amount of stock held by each, and that at least fifty per cent. had been paid up, of each subscription, in cash, or, if such is not the case, in what paid; and that no permit be issued unless such Commissioner of Highways is satisfied that there is enough paid up capital to complete the work in accordance with the plans submitted.

6. That a transfer of the privileges of the company to any other corporation be forbidden, under a penalty of a forfeiture of its privileges and all its property, without the assent in majority in value of its stockholders, and the approval of the Council.

7. That the company furnish, upon request of either branch of the Council's street committee, or by the Mayor, City Attorney and City Controller, or any two of them, with the City Controller, a sworn statement of its stockholders, that they hold stock in good faith for themselves and not for others, or, if held by trustees, the names of the persons for whom held, requiring the company to demand this information upon receiving for registry a transfer of the stock.

8. That the City be relieved from liability in case of any neglect of the corporation, resulting in damages to person or property.

9. That a consolidation be forbidden, in any way whatever, of the company with any other company, when a statute expressly authorized a consolidation upon certain terms.

10. That the City Engineer, in case the company employ careless, incompetent or unskilful men, might discharge such men, and take charge of the work, and complete it, requiring the company to pay estimates in advance for two squares at a time, or the imposition of a forfeiture, in case of a neglect, or refusal, for fifteen days.

11. That the company furnish a bond, conditioned for a faithful compliance with the provisions of the ordinance, and to indemnify the City against all loss, costs, suits, damages and expenses arising from the company's occupation and use of the streets.

The following provisions were held valid:

1. Fixing the depth to which the pipes should be laid, and allowing the City Engineer to designate what portion of the street should be occupied.

2. Requiring the company, when asking the permit, to submit to the Commissioner of Highways a plan and full specifications, showing the streets proposed to be opened, the location, kind and size of pipes.

3. Requiring the "system" to be approved by the City Engineer and natural gas committee of Councils, of escape pipes sufficient to carry off any and all gas which may leak or escape; gauges showing the pressure, open at all times to inspection, at points designated by the City Engineer; and that suitable means be used to protect pipes laid, where there are cinders or other injurious material.

4. Requiring that no pipes be laid between November 15 and April 15.

5. Authorizing the Commissioner of Highways to refuse, in his discretion, permission, if in his judgment the location proposed upon any highway, is injurious to the City; to require altera-

tions of the plans submitted; to limit the number of pipes upon any highway to two trunk lines of competing companies.

6. Requiring the company to pay the expense of repaving, or keeping in repair, for nine months, the streets opened for laying pipes, and that estimates for the cost thereof, for each section, not exceeding two squares, be furnished such Commissioner, and payment of the amount made to him, before permit issued for opening such squares: *Appeal of City of Pittsburgh* (1886), 115 Pa. 4.

The Pennsylvania Act of 1885 (proviso to section 2, P. L., p. 31) forbids the granting, by any borough or city, to any natural gas company, the exclusive privilege to occupy the streets of such borough or city, and therefore a city cannot, under the guise of "regulations," confer an exclusive privilege on a company for two years, requiring work to be begun at a fixed time, and gas to be introduced within fifteen months thereafter: *Meadville Fuel Gas Co.* v. *Meadville Natural Gas Co.*, decided in the Sup. Ct. Pa., May 31, 1886.

Where a company had a rightful entrance into a city, but the latter refused it the right to cross three streets, whereby great loss was sustained by the company in loss of gas, an injunction was granted to restrain the city's interference with crossing the streets, such a privilege having been granted to a rival company: *People's Natural Gas Co.* (1885), 1 Pa. C. C. 311.

An injunction to restrain a natural gas company from using the streets of a town, because of alleged insufficient protection to the inhabitants in the use of pipes, was refused; thereupon the town passed an ordinance regulating the matter, and asked leave to file a supplemental bill, setting up this ordinance. The Court refused to allow the bill to be filed: *Appeal of Borough of Butler*, decided in the Sup. Ct. of Pa., Nov. 11, 1886.

Unreasonable Rates.

A natural gas company, having the power to exercise the right of eminent domain, and to occupy the streets of a city or town, must serve all alike, and furnish gas at reasonable rates. This is especially so under a statute declaring that the transportation and supply of such gas is of public benefit, and preventing the granting, by a town or city, to any company, the exclusive privilege to occupy the streets and supply gas. Where a company, in a State where such a statute was in force, after furnishing gas at a reasonable price, with assurance of continuance, secured a monopoly by terms made with competing companies, demanded excessive rates and threatened to shut off the gas unless the increased rates were paid, a preliminary restraining order was granted upon bill and affidavit, until the question could be more thoroughly investigated: *Waddington* v. *Allegheny Heating Co.* (1888), 6 Pa. C. C. 96; *Sewickley Borough* v. *Ohio Valley Gas Co.* (1888), 6 Id. 99. See *Appeal of Scranton Electric Light and Heat Co.* (1888), 122 Pa. 154.

[See *Gas and Water Companies*, 27 AMER. LAW REG. 277.

Oil is a Mineral.

The Act of Pennsylvania (April 25, 1850, P. L. 573) relating to accounts between tenants in common of coal or iron ore mines or minerals, includes oil or petroleum, under the general term of "other minerals"; and the fact that oil was not known when the Act was passed (1850), does not alter the case: *Thompson* v. *Noble* (1870), 3 Pitts. (Pa.) 201. A "mineral, and being a mineral, is part of the realty:" *Stoughton's Appeal* (1879), 88 Pa. 198. But a reservation of "all minerals," in a deed, does not include petroleum: *Dunham* v. *Kirkpatrick* (1882), 101 Pa. 36.

Ownership of Oil.

Severance of oil from the freehold does not divest the owner of the title,

nor his right to the immediate possession, nor his replevying it, nor recovering its value if he sees fit. Oil in a well sunk by the owner of land is his exclusive property, whether drawn from an underground current of oil, or found standing. The case is not analogous to the surface owner's right in running streams of water. Such oil taken out of the well by a wrong-doer, remains the property of the well-owner: *Hail* v. *Reed* (1854), 15 B. Mon. (Ky.) 479.

Leases.

"Oil" is not synonymous with "gas": therefore a lease of land to be occupied and worked for petroleum, rock or carbon oil, and not for any other purpose whatsoever; conditioned that if no oil be found in paying quantities within four years, the lease to be null and void, is not satisfied by the finding of gas: *Truby* v. *Palmer*, decided in the Sup. Ct. of Pa., October 4, 1886.

Oil land, described by metes and bounds, with a "protection" of eight rods on the north side and ten rods on the east side, was leased to E. It was claimed that the north and east lines of the protection were not to be extended respectively beyond the east line and north lines of the leased property; and consequently the tract in the northeast corner, eight by ten rods, could be leased by the owner to T. for the purposes of sinking an oil well. The Court held that it could not; that the tract of eight by ten rods was within the "protection;" and having leased this tract, T., who sank a well, and thereby injured A.'s well on the leased premises, was liable to E. for damages, and would be enjoined in the same action: *Allison & Evans' Appeal* (1875), 77 Pa. 221.

B. leased to L. a tract of land, L. to have the sole right to bore for oil for twenty years, L. to commence operations in sixty days and to continue with due diligence; if L. ceased operations twenty days at any one time, B. could resume possession. It was stipulated that L.'s failure to comply with any one of the conditions, should work a forfeiture, and B. might enter and dispose of the premises as if the lease had not been made. It was also stipulated that if L. did not commence work at the time specified, he should pay B. $30 a month until L. should commence. Held, that the covenant of forfeiture was modified, not abrogated, by the clause for payment of rent; and L., having failed to to commence work for four months and then paying rent, was not entitled, at the end of eleven months from the date of payment, to tender the rent due and insist upon a continuation of the lease: *Brown* v. *Vandergrift* (1875), 80 Pa. 142.

A grant of certain land, in consideration of money paid, for the privilege of going upon it to prospect and bore for oil, with the exclusive use of one acre around each well, and with free ingress and egress in common with the grantor, the latter to have one-third of all "that is taken out" and the right of tillage of the land not occupied in operating the wells, does not amount to a lease nor sale of the land or oil, no estate in soil or oil being granted. The right of the grantee is to experiment for oil, sever it from the soil and take it, on yielding one-third to the grantor. The right of the grantee is a mere license to work the land for oil, coupled with an interest, not revocable at the pleasure of the grantor or licensor: *Funk* v. *Haldeman* (1867), 53 Pa. 229.

A lease of land for oil required operations to be commenced within sixty days from the date of lease, one well to be completed within three months after such operations are begun; and, in case of a failure to complete one well within that time, the lessee was to pay the lessor for such delay $1000 per annum, within three months after the time of

completing such well. It was also covenanted that a failure to complete one well, or make such payment within that time, "renders this lease null and void, and to remain without effect between the parties thereto." The lessee did nothing towards drilling a well, nor did he make any payment within three months after a well should have been completed. It was held that a forfeiture of the lease did not happen until default was made, both in completing the well and in paying for the delay, or failure to complete it. But the lessee having neither drilled the first well nor paid the price of delay, the lessor was entitled to recover at the stipulated rate, for the time the lessee held exclusive right to operate: *Galey* v. *Kellerman* (1889), 123 Pa. 491.

An assignee of an oil-and-gas-lease is not liable to the lessor, upon a covenant of the lease to drill a well upon the demised premises, when the time for performance had elapsed before the assignee acquired title under the assignment: *Washington Natural Gas Co.* v. *Johnson* (1889), 123 Pa. 576.

B. leased A's farm for the purpose of exploring for oil, at a royalty of one-eighth of the production. He covenanted "To continue, with due diligence and without delay, to prosecute the business to success or abandonment; and if successful, to prosecute the same without interruption, for the common benefit of the parties." He assigned an interest in the lease to C. and D., and they with B. assigned to E. Two wells were bored, both of which were producing wells. E. refused to bore any other wells. A. sued E. upon the covenant quoted. It was held that this covenant was not the personal covenant of B., but a covenant running with the land, and binding on E.: and that the measure of damages was the amount of the oil A. ought to have received above the actual receipt, and the value of it during the times when it should have been delivered to him; deducting therefrom the cost of producing, what ought to have been produced at the time, under the circumstances, and with the appliances then known; and adding to this remainder the interest on it from the time when the oil ought to have been produced to the time of the trial: *Bradford Oil Co.* v. *Blair* (1886), 113 Pa. 83.

A lessee under an *oil* lease, may not conduct the *natural gas* away from the land and appropriate it to his own use: *Kitchen* v. *Smith* (1882), 101 Pa. 452; *contra*, *Wood County Petroleum Co.* v. *W. Va. Transportation Co.* (1886), 28 W. Va. 210.

A grant of land "for the purpose of prospecting, boring, digging, drilling, pumping and otherwise searching for and obtaining oil, salt and other minerals thereon," reserving to the grantor one-fourth of all the oil produced, does not convey a fee, but only a right to work the land for oil, salt and other minerals; and the sub-grantees are bound by any conditions as to the control of the majority, that they may impose: *Thompson's Appeal* (1882), 101 Pa. 225.

But a lessee who has the possession of the land under an oil lease, has more than a mere license, and can recoup or recover taxes from the lessee under the Pennsylvania Act of April 3, 1804: *Kitchen* v. *Smith* (1882), 101 Pa. 452.

A lease was granted by the owner of land for the purpose of boring salt-wells and manufacturing salt, so long as the salt-well contemplated in the lease, should be carried on by the lessee or his assigns, under certain provisions for a forfeiture, for a rent of every twelfth barrel of salt manufactured. After a time, oil rose with the salt-water, which, though first allowed to run to waste, was collected and sold. The owner of the land claimed the oil, and brought

trover for it. It was held that trover would not lie, although the oil was his, for he had not the right of possession at the time of conversion by the lessee, either of the oil itself or of the land from which it flowed; but the proper remedy was a bill in equity for an account, the measure of damage being the value of the oil at the instant of separation from the freehold. It was shown that the lessee could not raise the salt-water without raising the oil with it: *Kier* v. *Peterson* (1862), 41 Pa. 357.

A reservation, "expressly reserving one-eighth of the oil produced from the land, to be divided between" the lessor and lessee "on the land," means one-eighth of the oil *raised to the surface* by the grantee, and that the grantor is entitled to his share without deduction for the expense in producing it: *Union Oil Company's Appeal* (1883), 3 Penny. (Pa.) 504.

An agreement to lease land for a term of years, with the exclusive right to bore for and collect oil, giving one-fourth to the lessor, passes a corporeal interest; and the lessee's taking of his share of the oil found is not waste, but a rightful act, unless the lease be forfeited by its own terms: *Chicago, etc., Oil and Mining Co.* v. *U. S. Petroleum Co.* (1868) 57 Pa. 83.

An agreement was made, giving a license to mine on land for oil, and a lease for ten years in case of a successful discovery. The lessor lost all rights thereunder by lapse of time, not having discovered oil within the time limited by the contract. The lessor then agreed to refrain from declaring a forfeiture, if the lessee would carry on the search for petroleum constantly and without cessation. It was held that the latter agreement was conditional; that its condition was suspension; and that when the lessee ceased to carry on search for oil, the lessor was entitled to declare the forfeiture of the contract by suit, and claim possession of the lands without a formal putting in default. The Court declined to decide whether sulphur was a "similar product," under a contract based particularly upon the expectation of finding petroleum: *Escoubos* v. *Louisiana Petroleum and Coal Oil Co.* (1870), 22 La. An. 280.

A lease, purporting to be a grant or license to take oil, drawn by an ignorant scrivener, at a time when the nature or value of the mineral was not known, should be construed with reference to the subject-matter, and the knowledge of such subject-matter at the time; and as to its inartificial use of technical language, the whole scope of the paper is to be considered: *French* v. *Brewer* (1861), U. S. Circ. Ct., W. Dist., Pa., 3 Wall. Jr. 346.

A lease, dated May 19, 1881, gave "the right to take, bore and mine for and gather all oil or gases found in and upon the premises, to have and to hold the same for the term of twelve years from this date, or as long as oil is found in paying quantities," the lessor to receive one-eighth of the oil produced and saved from the premises. The lessee covenanted "to commence operations for said mining purposes, and prosecute the same on some portion of the above described premises within two years from this date, or thereafter pay to the lessor [blank] dollars per [blank] until work is commenced. This lease shall be null and void, and at an end, unless the lessee shall, within six months from this date, commence and prosecute, with due diligence, unavoidable accidents excepted, the sinking and boring of one well on or in the vicinity of this lease, to a depth of 1200 feet, unless oil in paying quantities is sooner found. * * * If the lessee fail to keep and perform the covenants and

agreements by him to be kept and performed, then this lease shall be null and void, and surrendered to the lessor."

Within six months from the date of the lease, the lessee drilled a well 1200 feet deep finding natural gas at a depth of 1045 feet in large quantities, and some oil, but not in paying quantities, at 1093 feet. The lessee used the gas for fuel in drilling the well, but not in any other manner. In the fall of 1882, the lessee removed his engine, etc., leaving the casing in the well, and ceased to carry on mining operations. In February, 1884, the lessor released the premises to T., who assigned such lease to the defendant company, for the same purpose, pursuant to which they entered into possession of the same and collected and sold the gas.

The lessee in the first lease brought an action to restrain the lessee, and his assignee, in the second lease, and their common lessor from interfering with, or appropriating to their own use, the gas therein. It was held that there was no covenant in the lease which required the first lessee to continue the boring of oil wells upon the premises until oil was obtained in paying quantities, under a penalty of forfeiting his rights by a failure so to do; that the covenant requiring him to commence and prosecute operations for mining purposes within two years from the date of the lease, or thereafter pay to the lessor [blank] dollars per [blank] until work was commenced, was void for uncertainty, by reason of the blanks which were left in the vital and essential parts thereof; that if a clause, that the lessor was to have one-eighth of the gas, had been omitted by mistake, the contract could be re-formed and the clause inserted, so as to express the intention of the parties; that if it now expressed their intention, they must abide by it; that the claim (that the first lease had expired by reason of its own terms, as the provision that the lessee should "have and hold the same for the term of twelve years from this date, or so long as oil is found in paying quantities," limited the terms to that period, during which oil was found in paying quantities) was not well founded, and that the term fixed was for twelve years, and as much longer as oil was found in paying quantities: *Eaton* v. *Wilcox* (1886), 42 Hun (N. Y.) 61.

A. leased land to B., with an oil well partly bored thereon. B. agreed to sink this well deeper, and to pay A. a royalty of one-fourth of all oil obtained from it. Both parties supposed the well was situated on the leased premises; but it was afterwards discovered that such was not the case. Then B. offered to deliver possession of the premises leased, and refused to pay the royalty. It was held that a court of equity, on a bill to account, would not order an account; the action should have been brought at law. B. was not in a position to deny A.'s right to the royalty, and if an accounting was allowed, it would not be a bar to an action at law for the royalty: *Mays* v. *Dwight* (1876), 82 Pa. 462.

B. leased of A. certain oil lands. No rent was reserved, and no term of the demise stated. B. agreed in the lease, to put down a well to a depth of 600 feet, by a certain date; upon a failure to do so, a right of entry was reserved to the lessor. B. did not sink the well. The lessor sued to recover for the breach. It was held that if B. had dug the well, it would have been his as well as the product thereof; and that the lessor could only recover nominal damages for the breach, and not what it would cost to sink such a well. The lease was construed to be a perpetual one to B., if he sank the well and kept the covenants of the demise: *Chamberlain* v. *Parker* (1871), 45 N. Y. 569.

A mining lease, for a term certain,

saving only to the lessor the right of tillage, is exclusive, and the lessor cannot mine himself within the tenement: *Baker* v. *Dale* (1870), 3 Pitts. (Pa.) 190.

Land was leased exclusively for the purpose of producing oil, boring to be commenced within ten days, and continued with due diligence until success or abandonment; and a failure to get oil in paying quantities, or a cessure of work for thirty days at any time, amounted to a forfeiture of the lease. It was held that if the lessee failed to get oil in one well, he had a right to put down another, and as many more as he pleased, so long as he worked with diligence to success or abandonment; and that a cessation of work for thirty days forfeited the lease: *Munroe* v. *Armstrong* (1880), 96 Pa. 307.

In October, 1875, B. agreed with S. that the latter should, for a term of fifteen years, have the right to enter upon and use the lands of the former so far as might be necessary to enable him to bore for oil, reserving to B. the one-eighth of all oil produced. Unless S. should commence boring the said well within nine months from the date of the contract, it was "to become void and cease to be of any binding effect." This contract was recorded and assigned to the defendant, who entered upon the land and at once commenced to bore a well, in February, 1877. In September, 1876, B., who had remained in possession of the land and in no way waived, extended or qualified the fulfillment of the contract, executed another and similar lease to M. and others, conferring upon them the exclusive right to dig and bore for oil on the farm for the term of twelve years, which lease was recorded in January, 1877. [The reported decision says "1876," but this is evidently a clerical error.] M. and his co-lessees assigned their lease to the plaintiff, who, within the time therein specified, entered upon the land and commenced to bore a well. The plaintiff sued the defendant, his assignees and B., to procure a judgment declaring the S. lease forfeited and annulled, and to restrain the defendants from entering upon the land or boring therein for oil. The Court held that even though the lease appeared upon its surface to have become void by reason of the failure of the lessee to commence operations within the time limited by it, and though the act of the defendant in thereafter entering upon the land was a mere trespass, yet as the controversy related to the sinking of oil wells in land, in violation of rights therein claimed by the plaintiff, a court of equity would grant relief by injunction; that as B. continued at all times to occupy the land, it was not necessary that he should re-enter or give any notice of his intention to enforce the forfeiture occasioned by the neglect of the lessees to commence operations within the time limited; that even if any overt act or notice was required, the execution and delivery of the new lease to M. was a sufficient declaration of his election to enforce the forfeiture; and that the defendant could not show that after the execution and delivery of the lease to M., B. consented to his entering upon the land: *Allegheny Oil Co.* v. *Bradford Oil Co.* (1880), 21 Hun (N. Y.) 26; affirmed (1881), 86 N. Y. 638.

A court will not decide, unaided by expert evidence, that natural gas is included in a lease of the right to mine "for petroleum, rock or carbon oil, *or other valuable volatile substances*:" *Ford* v. *Buchanan* (1886), 111 Pa. 31.

The assignment of a leasehold interest, including engines, boilers, tanks, tubing, derricks, and all other fixtures and personal property situated upon and appertaining thereto, does not transfer oil in tanks at the well: *Dresser* v. *Transportation Co.* (1875), 8 W. Va. 553.

A. leased to B. 228 acres for the sole and only purpose of mining and excavating for gas and oil, for twenty years, or as long as oil or gas should be found on the premises in paying quantities within that period. The lessee agreed to commence operations upon one well within ninety days, and to prosecute the work "actively, diligently and continuously," and to complete the same on or before a day named, "and upon failure to do so within the time herein prescribed, to pay the party of the first part the sum of $1000 annually, in advance," etc. It was declared that upon a failure by the lessee to keep the covenants of the lease, that "such failure to perform, or breach of the said covenant, shall work an absolute forfeiture of this grant or lease, and the privileges or easements hereby given shall absolutely cease, determine, and become null and void." The Court held that the lessee could not terminate the lease by breach of the covenants, and the lessor might or might not terminate it, on such breach, at his pleasure: *Wills* v. *Manufacturers' Natural Gas Co.*, decided in the Supreme Ct. of Pa., Nov. 11, 1889.

Measure of Damage on a Contract to Dig an Oil or Gas Well.

A. contracted to sink an oil well within twelve months, or pay $25 per annum until work commenced. In an action for this sum, it was held to be a good defense, except as to nominal damages, that the contract was founded on a mutual mistake as to the existence of oil on the lands: *Bell* v. *Truit* (1872), 9 Bush (Ky.) 257.

If the contract is to dig a well a certain depth and of a certain width, digging one of the required depth, but of a narrower width, is not a compliance with the contract; and there can be no recovery, even if no gas is found, although the one dug was as effectual in determining whether gas could there be found as the wider one: *Gillespie Tool Co.* v. *Wilson* (1888), 123 Pa. 19.

Grant of Exclusive Use of Streets.

[Beyond compensation for the additional burden upon the land used as a street (*supra*, page 105), the greater question arises of the power to secure the exclusive right to lay pipes.

As a result of many authorities upon this subject, it may be stated that a town or city, without power expressly conferred upon it by statute, cannot grant to a natural or artificial gas company, or one incorporated to furnish water, the right to an exclusive use of its streets, for the purpose of laying pipes therein, and supplying the inhabitants with gas or water; and if it does do so, it may, without danger of liability, disregard the grant and give other and similar companies, such privileges. If the town or city is empowered to grant such exclusive use by statute, or the legislature grant such an exclusive privilege; and the privilege or use is accepted by the company, and expenditures are made in pursuance thereof, the grant becomes a contract, which cannot be revoked, either by the city or the legislature.

[These statements are sustained and illustrated by the following cases:

Municipal Grant.

[Such grants are void, because the general rule of law denies to municipal corporations, the power to create monopolies: ELLIOTT, J., *Citizens G. & M. Co.* v. *Town of Elwood* (1887), 114 Ind. 332, 336. *Ill. & St. L. R. R. & C. Co.* v. *City of St. Louis* (1872), U. S. Circ. Ct., E. Dist. Mo., 2 Dill. 70 (grain elevated); *Davenport* v. *Kleinschmidt* (1887), 6 Mont. 502, 529 (water supply).

["The exercise of such power may be convenient, but that is not sufficient; it must be essential and indispensable

to the powers expressly granted, or to the declared objects and purposes of the corporation. * * * It is certainly not essential, or necessarily incident to the power, expressly granted, 'to lay off streets,' etc., 'and light the same,' that the city should delegate to a private individual, or corporation, the exclusive right to furnish such light, and use the streets for that purpose. To justify such a construction, it must appear that in no other proper, or reasonable manner, could the city provide light for its streets and inhabitants:" SNYDER, J., *Parkersburg Gas Co.* v. *City of Parkersburg* (1887), 30 W. Va. 435, 440.

[Where municipalities are authorized to grant the privilege of using the streets, no arbitrary authority is thereby conferred, but their action must be by an ordinance which is general in its nature and impartial in its operation, and which does not grant a special privilege to any company: ELLIOTT, J. *Citizens G. & M. Co.* v. *Town of Elwood* (1887), 114 Ind. 332, 338.

[In this case, a statute of Indiana (approved March 7, 1887, Laws, p. 36) provides — "SECTION 1. *Be it, etc.*, That the Boards of Trustees of towns, and the Common Councils of cities in this State, shall have power to provide by ordinance, reasonable regulations for the safe supply, distribution and consumption of natural gas, within the respective limits of such towns and cities, and to require persons or companies, to whom the privilege of using the streets and alleys of such towns and cities is granted, for the supply and distribution of such gas, to pay a reasonable license for such franchise and privilege."

Municipal Revocation.

[If an exclusive grant is made, the municipality may subsequently make another grant to another company, with impunity; the first grant being a contract beyond the power of the municipality: *Grand Rapids E. L. & P. Co.* v. *Grand Rapids E. E. L. & F. G. Co.* (1888), U. S. Circ. Ct., W. Dist. Mich., 33 Fed. Repr. 659, 667, 677.

Municipal Contracts.

[If the contract is not warranted by the city charter, the city councils have, at all times, the right to declare it void and to refuse compliance with it: *Brenham* v. *Brenham Water Co.* (1887), 67 Texas 542, 553.

[Subject to legislative interference (see below), a contract with a coal gas company, properly entered into, will bind the municipality, upon informal renewal: *Taylor* v. *Lambertville* (1887), 43 N. J. Eq. 107, before BIRD, V. C. And may be modified by subsequent contracts: *City of St. Louis* v. *St. Louis G.-L. Co.* (1879), 70 Mo. 69; s. c., 5 Mo. App. 484.

[If a municipality refuses to take and pay for coal gas, it would probably be liable in damages: ADAMS, C. J., *Searl* v. *Abraham* (1887), 73 Iowa 507.

[Where a city charter gave authority to the common council to provide, by ordinance, "for a supply of water for said city," and an ordinance was duly passed for a contract, and the contract contained a stipulation to pay an annual sum for fire purposes, the city was bound to pay for the water supply under the terms of the contract. It was no defense that the contract was to be continued as long as the company performed its part, because the authority to contract in this manner could not be denied to the city, under another section of its charter, requiring taxation for defraying the expense of water supply to be annual: *Atlantic City W. W. Co.* v. *Atlantic City* (1886), 48 N. J. Law 378.

Additional Light.

[There is a strong current of authorities to the effect that an exclusive contract for lighting the streets by coal gas, is not infringed by granting permission

to an electric light company to light the streets, stores and houses: the question is interesting as showing the limits upon exclusive grants by municipalities. Upon the abstract question of more light, these authorities are not necessarily conclusive: *Parkersburg Gas Co.* v. *The City of Parkersburg* (1887), 30 W. Va. 435, 442; *Saginaw G.-L. Co.* v. *The City of Saginaw* (1886), U. S. Circ. Ct., E. D. Mich., 28 Fed. Repr. 529, 538.

Legislative Revocation.

[Where a municipality was authorized by statute, to contract with a coal gas company, for the lighting of the streets, and made a contract for five years, this contract could be terminated by the repeal of the statute within the five years: *Richmond Co. Gaslight Co.* v. *Middletown* (1874), 59 N. Y. 228, 232. The same ruling was made in the case of a ten year contract which the municipality afterwards repudiated: *Garrison* v. *City of Chicago* (1877), U. S. Circ. Ct., N. Dist. Ill., 7 Biss. 480; and a twenty-five year contract, on intervention of the State, by *quo warranto*: *The State, ex rel.* v. *Cin. G. L. & C. Co.* (1868), 18 Ohio St. 262.

Legislative Grant.

[The legislature may confer upon a private corporation, the exclusive right to furnish coal gas to the citizens of a municipality; and in such cases, the legislative right to supervise and control, remains, unless clearly given up in a constitutional manner: *State* v. *Milwaukee G. L. Co.* (1872), 29 Wis. 454, 460, 462; *The State, ex rel.* v. *Columbus G. L. & C. Co.* (1878), 34 Ohio St. 572; *City of Memphis* v. *The Memphis Water Co.* (1871), 5 Heisk. (Tenn.) 495, 530.

[Such privilege is a franchise which can only emanate, directly or indirectly, from the sovereign power of the State: SCOTT, J. *The State, ex rel.* v. *Cin. G. L. & C. Co.* (1868), 18 Ohio St. 262, 291; *Hamilton G.-L. Co.* v. *The City of Hamilton* (1889), U. S. Circ. Ct., S. Dist. Ohio, 37 Fed. Repr. 832, 837; *Saginaw G.-L. Co.* v. *City of Saginaw* (1886), U. S. Circ. Ct., E. Dist. Mich., 28 Fed. Repr. 529, 535, 536.

[This right was denied, as creating a monopoly, in the early coal gas case of *Norwich Gas Light Co.* v. *Norwich City Gas Co.* (1856), 25 Conn. 19. But all doubt has since been removed by subjecting such contracts to the police power of the State, while upholding their sanctity, when otherwise valid: *New Orleans Water Works Co.* v. *Rivers* (1885), 115 U. S. 674; *New Orleans Gas-Light Co.* v. *La. Light & Heat P. & M. Co.* (1885), Id. 650; *Louisville Gas Co.* v. *Citizens' G.-L. Co.* (1885), Id. 683; *St. Tammany Water Works Co. et al.* v. *New Orleans Water Works Co.* (1886), 120 U. S. 64; *The Binghampton Bridge* (1865), 3 Wall. (70 U. S.) 51, 81.

Exclusive Right of Way.

[In the case of the *West Virginia Transp. Co.* v. *Ohio River Pipe Line Co.* (1883), 22 W. Va. 600, the grant of an exclusive use of a tract of land, for a pipe and telegraph line, was held to be void, as contrary to public policy and imposing an unreasonable restraint upon trade, by preventing others from transporting oil from or through the land.

Restricting the Transportation of Natural Gas.

Natural gas, when brought to the surface, and placed in pipes for transportation, is an article of commerce, and the legislature cannot enact a law forbidding its transportation beyond the limits of the State: *State, ex rel. Corwin,* v. *Indiana & Ohio O. G. & M. Co.*, decided by the Supreme Court of Indiana, November 6, 1889.

W. W. THORNTON.

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